

REMARKS

I. Status of the Claims

Claims 1-32 are pending. Claims 1-22 stand rejected. Claims 23-32 are withdrawn from consideration by the Examiner as being directed to non-elected subject matter. No claims have been amended in this reply.

II. Rejection of claims 1-22 under 35 U.S.C. § 103(a)

The Examiner maintains the rejection of claims 1-22 under 35 U.S.C. § 103(a) as allegedly being unpatentable over U.S. Patent No. 6,540,791 to Dias ("Dias"), in view of U.S. Patent No. 6,260,556 to Legrand et al. ("Legrand"), and further in view of U.S. Patent No. 6,423,306 to Caes et al. ("Caes"). See Final Office Action, p. 2. Specifically, the Examiner alleges that Dias teaches a hair bleaching composition comprising polydecene, nonionic amphiphilic polymers, peroxygenated salt, an alkaline agent, and surfactants as recited in the rejected claims. See *id.* The Examiner concedes that Dias "does not disclose the particular peroxygenated salts of instant claim 11 or the hydrogen peroxide of instant claims 21 and 22." *Id.* at 3. The Examiner relies on Legrand for its teaching of anhydrous compositions for bleaching keratin fibers, including sodium persulphate and hydrogen peroxide. See *id.* The Examiner also concedes that Dias "differs from the instant application in that it does not disclose the gelling agent of the instant claims 1, 6-9, 18, 21 and 22." *Id.* The Examiner relies on Caes for its disclosure of claimed gelling agents. See *id.* at 4. The Examiner concludes that "[i]t would have been obvious to a person of ordinary skill in the art at the time the invention was made to make an anhydrous paste comprising a peroxygenated salt, an alkaline agent, a

polydecene, and a gelling agent, as taught by Dias, in view of Legrand, et al., [and] further in view of Caes, et al.” *Id.* at 4-5. The Examiner also states that “[w]hile the Dias reference does not explicitly teach all the instant claimed percentages of agents, it would have been obvious to one of ordinary skill in the art at the time the invention was made to determine suitable percentages through routine or manipulative experimentation to obtain the best possible results, as these are variable parameters attainable within the art.” *Id.* at 4. Applicant respectfully disagrees and traverses this rejection for reasons of record and for the following additional reasons.

The Federal Circuit has stated that “rejections on obviousness cannot be sustained with mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” M.P.E.P. § 2142 (citing *In re Kahn*, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006)); *see also KSR Int’l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1741, 82 USPQ2d 1385, 1396 (2007) (quoting the Federal Circuit statement with approval).

Exemplary rationales that may support a conclusion of obviousness include, *inter alia*, “simple substitution of one known element for another to obtain predictable results,” or “some teaching, suggestion, or motivation in the prior art that would have led one of ordinary skill to modify the prior art reference or to combine prior art reference teachings to arrive at the claimed invention.” M.P.E.P. § 2143 (emphasis added). “To reach a proper determination under 35 U.S.C. 103, the examiner must step backward in time and into the shoes worn by the hypothetical ‘person of ordinary skill in the art’ when the invention was unknown and just before it was made. In view of all factual information,

the examiner must then make a determination whether the claimed invention 'as a whole' would have been obvious at that time to that person." M.P.E.P. § 2142.

Applicant maintains that in light of the above-cited guidance from the M.P.E.P., the Examiner has failed to satisfy the initial burden of establishing a *prima facie* case of obviousness. Applicant thus respectfully submits that the Examiner's conclusion of obviousness lacks merit. Specifically, the Examiner has provided "mere conclusory statements" and has failed to articulate "reasoning with some rational underpinning" for why one of ordinary skill would choose to modify Dias to arrive at the presently claimed anhydrous paste in view of the reasons of record and the following reasons.

The Examiner has not articulated a rationale as to why a person of ordinary skill in the art would modify Dias to include the gelling agents taught by Caes. Dias teaches a variety of thickeners, but makes no mention of gelling agents whatsoever. Caes teaches multi-block copolymers, as part of transfer resistant cosmetic compositions for applications including "pigmented cosmetics, including foundations, concealers, mascaras, eye liners, lipsticks, eyeshadows; nail varnishes; hairsprays, gels and mousses, sunscreen lotions, moisturizing lotions, lotions with active ingredients, and fragrance." Caes, col. 6, lines 33-37. The Examiner has failed to provide a reason for why one skilled in the art would modify the composition of Dias, which already contains thickeners, with additional gelling agents. Furthermore, the Examiner has failed to provide a reason for why one skilled in the art would modify a composition for hair bleaching by incorporating therein gelling agents from a reference which teaches pigmented cosmetic compositions that are transfer resistant. The application of a hair bleaching composition is a short process ranging for a fixed time, and upon reading

Dias, one would not contemplate that transfer resistance would be a concern during hair bleaching. The Examiner's allegation that one skilled in the art would have been motivated to combine Dias and Caes amounts to a mere conclusion devoid of any rational underpinning.

Applicant has argued on record that Dias teaches away from an anhydrous product having a water content less than 1% by weight relative to the total weight of the paste as currently recited in the claims. In response, the Examiner takes the position that the greater than 2.5% water content disclosed by Dias and the less than 1% water content instantly claimed are "close enough that one skilled in the art would have expected them to have the same properties." Final Office Action, p. 5. The Examiner further relies on *Titanium Metals* in support of the rejection of record because that case "dealt with close but non-overlapping ranges." *Id.* at 6.

Applicant respectfully disagrees because the M.P.E.P. makes the distinction that "if the reference's disclosed range is so broad as to encompass a very large number of possible distinct compositions, this might present a situation analogous to the obviousness of a species when the prior art broadly discloses a genus." M.P.E.P. § 2144.05 (citing *In re Harris*, 409 F.3d 1339, 74 USPQ2d 1951 (Fed. Cir. 2005); see also *In re Baird*, 16 F.3d 380, 29 USPQ2d 1550 (Fed. Cir. 1994); *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992); MPEP § 2144.08.

Here, Dias discloses a very broad range of diluent level of "from about 5% to about 99.98%." Dias, col. 45, line 16. Moreover, "[t]he Examiner agrees that the disclosed range of diluent level is broad." Final Office Action, p. 6. Therefore, it would be improper to consider the presently claimed water-content range of less than 1% to

be obvious over the very broad range disclosed in Dias. The Examiner contends that Dias provides specific disclosures of non-aqueous formulations containing *de minimus* water concentration. *Id.* However, Dias provides no reason why a person of ordinary skill in the art would arrive at the claimed anhydrous paste.

Further, the instant claims limit the polydecene concentration to be ranging from 15% to 35%. A person skilled in the art would not expect a composition with a range of up to 3% of the conditioning component, as disclosed in the Dias, to have the same properties as a composition with the claimed range of at least 15% of polydecene. As the Examiner acknowledges, the proper inquiry in determining obviousness involves examining the difference between the prior art and the claims at issue. Final Office Action, page 6. Nevertheless, the Examiner cites to a single instance in the present specification disclosing a polydecene concentration as low as 5%, and contends that the disclosure is evidence that a person of ordinary skill in the art would expect the concentration of polydecene in Dias (up to 3%) to have the same properties as the claimed composition, which requires at least 15% polydecene. *See id.* at 6-7. Neither the claimed range nor the disclosed range of polydecene overlaps with that disclosed in Dias. Moreover, the Examiner has failed to provide any reason why a person of ordinary skill in the art would modify the range of polydecene disclosed in Dias to arrive at the claimed range in the instant specification.

One of ordinary skill in the art would not have been able to attain the composition of the instant claims in view of Dias as discussed above. Accordingly, as the Examiner has failed to establish a *prima facie* case of obviousness, Applicant respectfully requests this rejection be withdrawn.

CONCLUSION

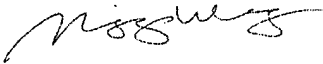
In view of the above arguments, Applicant respectfully requests reconsideration of the application and timely allowance of the pending claims.

Please grant any extensions of time required to enter this response and charge any additional required fees to our Deposit Account No. 06-0916.

Respectfully submitted,

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